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MEMORANDUM

(5/14/14)

This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) changed or created after the 17th edition of the book was published in 2013. The Administrative Office of the Courts' website includes Word and WordPerfect "without comments and footnotes" versions of the instructions at issue. The "with comments and footnotes" versions of newly created instructions 31.22, 38.01, and 38.22 are attached to this memorandum. If the committee changed a comment and/or footnote but did not change the text of an instruction, the instruction will be listed below but it will not be posted on the AOC's website.

3.01 – Criminal Responsibility

- a. Insert the following language as a new paragraph in brackets immediately before the last paragraph (that begins with "Before you find the defendant(s) guilty"): [To find a defendant criminally responsible for the acts of another, it is not necessary that you find the defendant was present or that the defendant took a physical part in the crime; encouragement of the principal offender is sufficient. However, mere presence during the commission of the offense is not sufficient to support a conviction.](INSERT FOOTNOTE HERE WITH THE FOLLOWING TEXT: *State v. Little*, 402 S.W.3d 202, 217 (Tenn. 2013).)
- b. Add the following as a new, bracketed paragraph at the end of the instruction on p. 34: [It is not a defense that the person for whose conduct the defendant is criminally responsible *[belonged to a class of persons who by definition of the offense was legally incapable of committing the offense in an individual capacity] [has been acquitted] [has not been [prosecuted] [convicted]] [has been convicted of a [different offense] [different type or class of offense]] [is immune from prosecution].*](INSERT FOOTNOTE HERE WITH THE FOLLOWING TEXT: T.C.A. § 39-11-407.)

- c. Delete the text of existing footnote 6 on p. 33 and substitute the following: *State v. Howard*, 30 S.W.3d 271 (Tenn. 2000). This is known as the “Natural and Probable Consequences Rule.” See Comment 2.
- d. Add a Comment 2 with the following text:

“The natural and probable consequences rule arose as a common law component of criminal responsibility and extends criminal liability to the crime intended by a defendant, and collateral crimes committed by a co-defendant, that were the natural and probable consequences of the target crime.” *State v. Richmond*, 90 S.W.3d 648, 654 (Tenn. 2002) (citing *State v. Carson*, 950 S.W.2d 951, 954 (Tenn. 1997)). “The rule underlies the doctrine of criminal responsibility and is based on the recognition that aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put into motion.” *State v. Howard*, 30 S.W.3d 271, 276 (Tenn. 2000) (citing *Carson*, 950 S.W.2d at 954-44). In *Howard*, the Tennessee Supreme Court set out a three prong test that courts are to apply when liability is based upon the natural and probable consequences rule:

the State must prove beyond a reasonable doubt and the jury must find the following: (1) the elements of the crime or crimes that accompanied the target crime; (2) that the defendant was criminally responsible pursuant to Tennessee Code Annotated section 39-11-402; and (3) that the other crimes that were committed were the natural and probable consequences of the target crime.

Howard, 30 S.W.3d at 276. The natural and probable consequences rule is an “essential element that the State must prove beyond a reasonable doubt,” and failure to instruct the jury on this rule is constitutional error. *Richmond*, 90 S.W.3d at 657 (citing and quoting *Howard*, 30 S.W.3d at 277 n. 6).

4.01(a) – Criminal Attempt: First Degree Murder Where The Victim Suffers Serious Bodily Injury

- a. On the last line of Comment 1, delete 40-35-501(k) and substitute 40-35-501(k)(5).

6.02(a) – Aggravated Assault (on or after 7/1/13)

- a. On the seventh line of Comment 1 on p. 90, delete 40-35-501(k) and substitute 40-35-501(k)(7).

6.04 – Vehicular Assault

- 1. On p. 96, move the second paragraph of the definition section so it appears at the end of the first paragraph. This will now be one long paragraph instead of two separate paragraphs.
- 2. On p. 97, move the second full paragraph of the definition section so it appears at the end of the first paragraph. This will now be one long paragraph instead of two separate paragraphs.
- 3. For both of the requests above, you are combining the paragraph that defines “intoxication” with the paragraph that defines “under the influence of [an intoxicant] [a controlled substance], etc.”

7.08(b) – Vehicular Homicide (Intoxication)

1. On pp. 176-77, combine the paragraph that begins with “[Only for offenses committed on or after 1/1/11: “Intoxication is defined, etc.” with the paragraph that appears immediately after it. This will now be one long paragraph instead of two separate paragraphs.
2. On pp. 177-78, make this same change to the first full paragraph (defining “intoxication”) and the paragraph that appears immediately after it.

8.01 – Kidnapping

- a. In footnote 12, delete the period that appears after “39-13-301(3)”
- b. Insert “former” before “T.C.A.” in footnote 10.
- c. Delete the first paragraph in the definition section following the elements on p. 199 and substitute the following (RETAIN THE FOOTNOTE):

A removal or confinement is "unlawful" if it is accomplished by force, threat or fraud, or, in the case of a person who is *[under the age of thirteen (13)] [incompetent]*, if it is accomplished without the consent of a parent, guardian or other person responsible for the general supervision of the *[minor's] [incompetent's]* welfare.

8.02 – Aggravated Kidnapping

- a. Delete the first paragraph in the definition section following the elements on p. 204 and substitute the following (RETAIN THE FOOTNOTE):

A removal or confinement is "unlawful" if it is accomplished by force, threat or fraud, or, in the case of a person who is *[under the age of thirteen (13)] [incompetent]*, if it is accomplished without the consent of a parent, guardian or other person responsible for the general supervision of the *[minor's] [incompetent's]* welfare.

- b. Insert “former” before “T.C.A.” in footnote 11.

8.03 – Especially Aggravated Kidnapping

- a. Delete the first paragraph in the definition section following the elements on p. 209 and substitute the following (RETAIN THE FOOTNOTE):

A removal or confinement is "unlawful" if it is accomplished by force, threat or fraud, or, in the case of a person who is *[under the age of thirteen (13)] [incompetent]*, if it is accomplished without the consent of a parent, guardian or other person responsible for the general supervision of the *[minor's] [incompetent's]* welfare.

- b. Insert the following definition between the definitions for “fraud” and “serious bodily injury” on p. 210:

["Incompetent" means a person who is in need of partial or full supervision, protection, and assistance by reason of mental illness, physical illness or injury, advanced age, developmental disability, or other mental or physical incapacity.](INSERT A FOOTNOTE HERE WITH THE

FOLLOWING TEXT: The term “incompetent” is not defined in Title 39. The Committee derived the definition from former T.C.A. § 34-4-102(2).)

11.42 – TennCare Fraud

- a. Delete the text of footnote 1 and substitute the following: T.C.A. § 71-5-2601(a)(1)(A) and (a)(5).
- b. Delete the text of Comment One and substitute the following: TennCare fraud is a Class E felony. T.C.A. § 71-5-2601(a)(1)(B) and (a)(5)(D).
- c. Insert the following after element 3 of Part C:

or

[Part D:

(1) that the defendant knowingly *[sold] [delivered] [aided and abetted any person in the [sale] [delivery] off]* a drug;

and

(2) that the defendant used TennCare to obtain the drug.]

- d. Insert the following between the definitions of “aider and abettor” and “knowingly”:

 [“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.]
 HERE INSERT A FOOTNOTE WITH THE FOLLOWING TEXT: T.C.A. § 39-17-402(6).

 [“Drug” means:

- (A) Substances recognized as drugs in the United States Pharmacopoeia, official Homeopaths Pharmacopoeia of the United States, or official National Formulary, or any supplements to any of them;
- (B) Substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animal;
- (C) Substances, other than food, intended to affect the structure or any function of the body of man or animal; and
- (D) Substances intended for use as a component of any article specified in subdivisions (A), (B) or (C). “Drug” does not include devices or their components, parts, or accessories.]HERE INSERT A FOOTNOTE WITH THE FOLLOWING TEXT: T.C.A. § 39-17-402(11).

- e. In the definition of “Deliver or delivery” insert a footnote with the following text immediately after the comma that follows “controlled substance”: As TennCare fraud is a title 71 offense, the definition of “controlled substance” contained in T.C.A. § 39-17-402(4) does not strictly apply. T.C.A. § 39-17-402 begins with the language “As used in this part and title 53,” and so the definitions contained in that statute only apply to Title 39 and 53 offenses. Upon agreement of the parties, it is recommended that a definition of controlled substance be included in the written charge. The court may desire to refer to Title 39 for the definition.
- f. Insert the following new definition after the definition of “Deliver or Delivery”:

["Sell" or "sale" means a bargained-for offer and acceptance and an actual or constructive transfer or delivery of the substance.]HERE INSERT A FOOTNOTE WITH THE FOLLOWING TEXT: *State v. Holston*, 94 S.W.3d 507, 510 (Tenn. Crim. App. 2002).

14.04 – Vandalism

- a. In Comment 2, delete 39-11-106(6) and substitute 39-11-106(a)(6)

21.01(c) – Aggravated Child [Abuse] [Neglect] (on or after 7/1/09)

- a. In the last line of Comment 1, delete 40-35-501(k) and substitute 40-35-501(k)(6).
- b. In the first line of the definition of "serious bodily injury" on p. 695, delete "Serious bodily injury" and substitute "Serious bodily injury to the child"

21.02(b) – Child [Abuse] [Neglect] (on or after 7/1/05)

- a. In lines two and three of Comment 1, delete the following text: Child abuse involving injury of a child six (6) years of age or less is a Class D felony, and if no injury it is a Class E felony. T.C.A. § 39-15-401(b).
- b. Substitute the following text for the text that was deleted above: For offenses committed on or after 7/1/05 but prior to 8/15/09, child abuse involving injury of a child six (6) years of age or less is a Class D felony, and if no injury it is a Class E felony. T.C.A. § 39-15-401(a) and (b). For offenses committed on or after 8/15/09, child abuse involving injury of a child eight (8) years of age or less is a Class D felony, and if no injury it is a Class E felony. T.C.A. § 39-15-401(a) and (b).

21.03(b) – Aggravated Parental or Custodial Child Endangerment

- a. In the last line of Comment 1 on p. 711, delete 40-35-501(k) and substitute 40-35-501(k)(6).

26.03 – Tampering with or Fabricating Evidence

- a. Insert the following two new definitions (including the footnotes) in brackets immediately after the elements and prior to the definition of "official proceeding":

["Conceal" means to *[prevent disclosure or recognition of]* *[place out of sight]* a *[record]* *[document]* *[thing]*.](INSERT FOOTNOTE WITH THE FOLLOWING TEXT: *State v. Hawkins*, 406 S.W.3d 121, 132 (Tenn. 2013).)

["Destroy" means to ruin the evidentiary value of a *[record]* *[document]* *[thing]*.] (INSERT FOOTNOTE WITH THE FOLLOWING TEXT: *State v. Hawkins*, 406 S.W.3d 121, 132 (Tenn. 2013).)

31.01 – Controlled Substances: Manufacture, Delivery or Sale

- a. On pp. 961-62, delete the definitions of "manufacture" and "production" and substitute the following:

[“Manufacture” means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. “Manufacture” does not include the preparation or compounding of a controlled substance by an individual for the individual’s own use [**Only for methamphetamine offenses committed on or after 3/30/05:** unless the controlled substance is methamphetamine, its salts, isomers, or salts of its isomers].(INSERT FOOTNOTE 8 – same text as current instruction) “Production” includes the manufacturing, planting, cultivating, growing or harvesting of a controlled substance.(INSERT FOOTNOTE 9 – same text as current instruction)]

31.02 – Counterfeit Controlled Substances

- a. In the definitions of “deliver” and “distribute” delete “controlled substance” and substitute “counterfeit controlled substance”.
- b. On p. 966, delete the definitions of “manufacture” and “production” and substitute the following:

[“Manufacture” means the production, preparation, propagation, compounding, conversion or processing of a counterfeit controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. “Manufacture” does not include the preparation or compounding of a counterfeit controlled substance by an individual for the individual’s own use.(INSERT FOOTNOTE 7 – same text as current instruction) “Production” includes the manufacturing, planting, cultivating, growing or harvesting of a counterfeit controlled substance.(INSERT FOOTNOTE 8 – same text as current instruction)]

31.04 – Controlled Substances: Possession with Intent to Sell or Deliver

- a. On page 977, delete the paragraph that begins “[There are two types of possession” and substitute the following, in brackets:

[There are two types of possession recognized in the law: actual possession and constructive possession. A person who knowingly has direct physical control over an object at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and intention at any given time to exercise dominion and control over an object, either directly or through others, is then in constructive possession of it. However, the mere presence of the defendant in an area where drugs are found is not sufficient, standing alone, to find constructive possession. Neither is the defendant’s mere association with a person in control of the drugs or the property where the drugs are located.]

- b. Delete the text of existing footnote 8 and substitute the following: State v. Robinson, 400 S.W.3d 529, 534 (Tenn. 2013); State v. Williams, 623 S.W.2d 121 (Tenn. Crim. App. 1981).

31.12 – Unlawful Possession of Anhydrous Ammonia, etc. (prior to 3/30/05)

- a. On p. 1004, delete the definitions of “manufacture” and “production” and substitute the following:

“Manufacture” means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. “Manufacture” does not include the preparation or compounding of a controlled substance by an individual for the individual’s own use. (INSERT FOOTNOTE 6 – same text as current instruction) “Production” includes the manufacturing, planting, cultivating, growing or harvesting of a controlled substance.(INSERT FOOTNOTE 7 – same text as current instruction)

31.22 – Imitation Controlled Substances

- a. New instruction

38.01 – DUI, etc. (on or after 7/1/13)

- a. New instruction

38.01(a) – DUI, etc. (prior to 1/1/11)

- a. In the sixth line of Comment 1, add the following text after “and (s).”: A defendant whose blood or breath alcohol concentration was twenty-hundredths of one percent (0.20%) or more shall serve a minimum of seven consecutive calendar days rather than 48 hours. T.C.A. § 55-10-403(a)(1)(A)(ii).
- b. Delete the text of element (3)(b) and substitute the following: that the alcohol concentration in the defendant’s blood or breath was *[eight-hundredths of one percent (.08%) or more [for offenses occurring prior to 7/1/03, substitute “ten-hundredths of one percent (.10%) or more”]] [only for offenses committed on or after 7/1/98: twenty-hundredths of one percent (.20%)]*.
- c. Immediately following element (3)(b), delete “[and [only for offenses committed on or after July 1, 2005]” and substitute the following: “[only for offenses committed on or after 7/1/05: and” - You will retain footnote 2, which will now appear immediately after “and”

38.01(b) – DUI, etc. (on or after 1/1/11 but prior to 7/1/13)

- a. Delete footnote 1 and footnote 2.
- b. Delete the text of element (3)(b) and substitute the following:

that the alcohol concentration in the defendant’s blood or breath was *[eight-hundredths of one percent (.08%)] [twenty-hundredths of one percent (.20%)] or more.*

- c. Immediately above the line that says "[[_____] is a controlled substance analogue.]" on p. 1220, insert a line that says: "[[_____] is a Schedule ____ controlled substance.]"
- d. Immediately after the closing bracket of this new language, insert a footnote with the following text: As DUI is a title 55 offense, the definition of "controlled substance" contained in Tenn. Code Ann. § 39-17-402(4) does not strictly apply. Tenn. Code Ann. § 39-17-402 begins with the language "As used in this part and title 53," and so the definitions contained in that statute only apply to Title 39 and 53 offenses. Upon agreement of the parties, it is recommended that a definition of controlled substance be included in the written charge. The court may desire to refer to Title 39 for the definition.
- e. On p. 1220, delete the text of footnote 5 (which will actually be footnote 4 after footnotes 1 and 2 are deleted and the new footnote is added, as noted above) and substitute the following: As DUI is a title 55 offense, the definition of "controlled substance analogue" contained in Tenn. Code Ann. § 39-17-454 does not strictly apply. Tenn. Code Ann. § 39-17-454 begins with the language "As used in this section," and so the definition contained in that statute applies only to 39-17-454. Upon agreement of the parties, the trial judge should include this bracketed language if a controlled substance analogue is alleged in an element and it is one listed in T.C.A. § 39-17-452 as an analogue. If it is not listed, it will be a jury question, and the trial judge should utilize T.P.I.–Crim. 31.20, Controlled Substance Analogue.
- f. In the seventh line of Comment 1, add the following text after "and (s).": A defendant whose blood or breath alcohol concentration was twenty-hundredths of one percent (.20%) or more shall serve a minimum of seven consecutive calendar days rather than 48 hours. T.C.A. § 55-10-403(a)(1)(A)(ii).

38.22 – Boating Under the Influence

- a. New instruction

42.09 – Accomplice

- a. Following footnote 1 in the first paragraph on p. 1389, insert the following text and footnote:

[Only if an accomplice to a sex offense committed against a minor testifies in addition to the minor victim: The alleged victim is not an accomplice.](INSERT A FOOTNOTE WITH THE FOLLOWING TEXT: State v. Collier, 411 S.W.3d 886, 899 (Tenn. 2013).)

- b. Delete Comment 1.

42.09(a) – Alternative Instruction: Accomplice

- a. Following footnote 1 in the first paragraph on p. 1391, insert the following text and footnote:

[Only if an accomplice to a sex offense committed against a minor testifies in addition to the minor victim: The alleged victim is not an accomplice.](INSERT A FOOTNOTE WITH THE FOLLOWING TEXT: State v. Collier, 411 S.W.3d 886, 899 (Tenn. 2013).)

- b. Delete Comment 1.

42.16 – Absent Material Witness

- a. Delete the text of Comment 1 and insert the text of Comment 1 from 42.16(b) (as amended below).

42.16(a) – Alternative Instruction: Absent Material Witness

- a. Delete the text of Comment 1 and insert the text of Comment 1 from 42.16(b) (as amended below).

42.16(b) – Alternative Instruction: Absent Material Witness

- a. Insert the following text to line 9 of Comment 1 immediately prior to “For cases holding”:

To support a missing witness instruction, the party requesting it must establish “that ‘the witness had knowledge of material facts, that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and that the missing witness was available to the process of the Court for trial.’” *State v. Bigbee*, 885 S.W.2d 797, 804 (Tenn. 1994) (quoting *State v. Middlebrooks*, 840 S.W.2d 317, 334-35 (1992)) (internal citation and quotation marks omitted). To justify a missing witness instruction, “the witness who was not called must not have been equally available to both parties.” See *State v. Boyd*, 867 S.W.2d 330, 337 (Tenn. Crim. App. 1992); *Bolin v. State*, 472 S.W.2d 232, 235 (Tenn. Crim. App. 1971); *State v. Eldridge*, 749 S.W.2d 756, 758 (Tenn. Crim. App. 1988).

42.22 – Evidence of Mental State

- a. Add the following text to the end of the last paragraph of Comment 1 on p. 1418: To justify an instruction on diminished capacity, the proof must establish that any inability to form the requisite culpable mental state was the product of a mental disease or defect, not just a particular emotional state or mental condition. *State v. Adams*, 405 S.W.3d 641, 661 (Tenn. 2013) (proof that the defendant was on Ambien at the time of the offense is also not the type of mental disease or defect contemplated by a “diminished capacity” theory of defense.) In such a case, the trial judge may wish to utilize TPI – Crim. 40.02, Defense: Intoxication.

T.P.I. – CRIM. 31.22

IMITATION CONTROLLED SUBSTANCES

Any person who commits the offense of imitation controlled substances is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

[Part A:

(1) that the defendant knowingly *[sold]* *[delivered]* *[manufactured]* a substance;

and

(2) that the defendant knew the substance was an imitation controlled substance.]

or

[Part B:

(1) that the defendant knowingly possessed an imitation controlled substance;

and

(2) that the defendant intended to *[sell]* *[deliver]* *[manufacture]* the substance.]

or

[Part C:

(1) that the defendant intentionally *[smelled]* *[inhaled]* *[injected]* *[ingested]*
[consumed in any manner whatsoever] *[[possessed]* *[used]* for the

purpose of [smelling] [inhaling] [injecting] [ingesting] [consuming in any manner whatsoever]] an imitation controlled substance;

and

(2) that the act was for the purpose of causing *[a condition of intoxication, inebriation, elation, dizziness, excitement, stupefaction or paralysis] [the dulling of the brain or nervous system] [the disturbing or distorting of the audio or visual processes].]*

[Only for offenses committed on or after 7/1/13: “Imitation controlled substance” means a pill, capsule, tablet, or substance in any form whatsoever if it is not a controlled substance listed in Title 39, Chapter 17, Part 4; is subject to abuse; purports, by express or implied representations, to act like a controlled substance that is a stimulant or depressant of the central nervous system; and is not commonly used or recognized for use in that particular formulation for any purpose other than as a stimulant or depressant of the central nervous system; or the chemical structure of the substance is a derivative or analogue of the chemical structure of a controlled substance; and the substance is not commonly used or recognized for use in that particular formulation for any purpose other than as a stimulant or depressant of the central nervous system. “Imitation controlled substance” does not include a pill, capsule, tablet, or substance in any form whatsoever if it is marketed or promoted, or sold as permitted by the United States food and drug administration.]²

[Only for offenses committed prior to 7/1/13: “Imitation controlled substance” means a pill, capsule, tablet, or substance in any form whatsoever which is not a controlled substance listed in Title 39, Chapter 17, Part 4, which is subject to abuse, and which by express or implied representations, purports to act like a controlled substance as a stimulant or depressant of the central nervous system and which is not commonly used or recognized for use in that particular formulation for any purpose other than for such stimulant or depressant effect, unless marketed, promoted, or sold as permitted by the United States food and drug administration; and the chemical structure of which is a derivative of, or substantially similar to, the chemical structure of a controlled substance.]

In determining whether a pill, capsule, tablet, or substance in any other form whatsoever is an imitation controlled substance, there shall be considered, in addition to all other relevant factors, comparisons with accepted methods of marketing for legitimate nonprescription drugs for medicinal purposes rather than for drug abuse or any similar nonmedicinal use, including consideration of the packaging of the drug and its appearance in overall finished dosage form, promotional materials or representations, oral or written, concerning the drug, and the methods of distribution of the drug and where and how it is sold to the public.³

[In determining whether any person intends to manufacture, sell, give or distribute an imitation controlled substance, it may be inferred⁴ from, in addition to all other relevant evidence, whether any distribution or attempted

distribution of such pill, capsule, tablet or substance in any other form whatsoever included an exchange of or a demand for money or other property as consideration, and, if so, whether the amount of such consideration was substantially greater than the reasonable value of such pill, capsule, tablet or substance in any other form whatsoever, considering the actual chemical composition of such pill, capsule, tablet or substance in any other form whatsoever and, where applicable, the price at which over-the-counter substances of like chemical composition sell.]⁵

["Sell" or "sale" means a bargained-for offer and acceptance and an actual or constructive transfer or delivery of the substance.]⁶

["Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of an imitation controlled substance, whether or not there is an agency relationship.]⁷

["Distribute" means to deliver other than by administering or dispensing an imitation controlled substance.]⁸

["Manufacture" means the production, preparation, propagation, compounding, conversion or processing of an imitation controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

"Manufacture" does not include the preparation or compounding of an imitation controlled substance by an individual for the individual's own use.⁹

“Production” includes the manufacturing, planting, cultivating, growing or harvesting of an imitation controlled substance.^{10]}

[“Knowingly” means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.]^{11]}

[The requirement of “knowingly” is also established if it is shown that the defendant acted intentionally.]^{12]}

“Intentionally” means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.^{13]}

COMMENTS

1. A violation of Part A or Part B is punishable as a Class E felony, with a fine of not less than two thousand dollars (\$2,000) and not more than five thousand dollars (\$5,000). T.C.A. § 39-17-453(f)(1). Violation of Part C is a Class A misdemeanor, with a fine of not less than two hundred fifty dollars (\$250) and not more than two thousand five hundred dollars (\$2,500). T.C.A. § 39-17-453(f)(2).

¹ T.C.A. § 39-17-453(a)-(c).

² T.C.A. § 39-17-453(d).

³ T.C.A. § 39-17-453(e)(1).

⁴ If the defendant is charged with possessing with intent to manufacture, sell, give or distribute, this inference “shall be transmitted to the jury by the trial judge’s charge.” T.C.A. § 39-17-453(e)(2). The trial judge may also wish to utilize T.P.I. – Crim. 42.19, Inferences.

⁵ T.C.A. § 39-17-453(e)(2).

⁶ State v. Holston, 94 S.W.3d 507, 510 (Tenn. Crim. App. 2002).

⁷ T.C.A. § 39-17-402(6).

⁸ T.C.A. § 39-17-402(9).

⁹ T.C.A. § 39-17-402(15).

¹⁰ T.C.A. § 39-17-402(24).

¹¹ T.C.A. § 39-11-106(a)(20).

¹² T.C.A. § 39-11-301(a)(2).

¹³ T.C.A. § 39-11-106(a)(18).

T.P.I. -- CRIM. 38.01

**DRIVING UNDER THE INFLUENCE [ACCOMPANIED BY A CHILD]
[RESULTING IN SERIOUS BODILY INJURY TO A CHILD] [RESULTING IN
THE KILLING OF A CHILD]
(for offenses committed on or after 7/1/13)**

Any person who commits the offense of driving under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a controlled substance analogue] [a drug] [a substance affecting the central nervous system] [or any combination thereof] [accompanied by a child] [resulting in serious bodily injury to a child] [resulting in the killing of a child]* is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

- (1) that the defendant was driving or was in physical control of an automobile or motor driven vehicle;

and
- (2) that this act occurred on a *[public road or highway] [shopping center] [trailer park] [apartment house complex] [location which is generally frequented by the public at large];*

and
- (3)(a) that the defendant was under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a controlled substance analogue] [a drug] [a substance affecting the central nervous system] [or any combination thereof];*

or
- (b) that the alcohol concentration in the defendant's *[blood or breath*

was eight-hundredths of one percent (.08%)] [blood was twenty-hundredths of one percent (.20%)] [or more]²].

or

- (c) that the defendant's blood alcohol concentration was four-hundredths of one percent (.04%) [or more]³ and the vehicle was a commercial motor vehicle.

[and

- (4)(a) that the defendant was accompanied by a child under eighteen (18) years of age;

or

- (b) that the defendant was accompanied by a child under eighteen (18) years of age, and such child suffered serious bodily injury⁴ as the proximate result of the defendant's driving under the influence;

or

- (c) that the defendant was accompanied by a child under eighteen (18) years of age, and such child was killed as the proximate result of the defendant's driving under the influence.]

[[_____] is a Schedule ____ controlled substance.]⁵

[[_____] is a controlled substance analogue.]⁶

["Commercial motor vehicle" means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle:

- (A) Has a gross vehicle weight rating or gross combination weight rating

of twenty-six thousand one (26,001) or more pounds;

(B) Is designed to transport more than fifteen (15) passengers, including the driver; or

(C) Is of any size and is used in the transportation of hazardous materials, as defined in this section;

[The following vehicles are not commercial motor vehicles:

(i) Vehicles that are controlled and operated by a farmer or nursery worker that are used to transport either agricultural products, farm machinery, or farm supplies to or from a farm or nursery, and are not used in the operations of a common or contract motor carrier and are used within one hundred fifty (150) miles of the person's farm or nursery;

(ii) Vehicles designed and used solely as emergency vehicles that are necessary for the preservation of life or property or the execution of emergency governmental functions performed under emergency conditions and not subject to normal traffic regulation, operated by paid or non-paid personnel;

(iii) Vehicles operated for military purposes by active duty military personnel; members of the military reserves; members of the national guard on active duty, including personnel on full-time national guard duty, personnel on part-time national guard training, and national guard military technicians (civilians who are required to wear military uniforms); and active duty United States coast guard personnel. This exception is not applicable to United States reserve technicians;

(iv) Vehicles designed and used primarily as recreational vehicles; and

(v) Vehicles leased strictly and exclusively to transport personal possessions or family members for nonbusiness purposes.]]⁷ ["Recreational vehicle" means a motor vehicle primarily designed as temporary living quarters for recreational camping or travel, as defined in ANSI Standards A119.2 and A119.5. The basic entities are: travel trailer, camping trailer, truck camper, motor home and park trailer.]⁸

"Intoxication" is defined as acting under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a controlled substance analogue] [a drug] [a substance affecting the central nervous system] [or any combination thereof]*.

The expression "under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a controlled substance analogue] [a drug] [a substance affecting the central nervous system] [or any combination thereof]*" covers not only all the well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition which is the result of taking *[an intoxicant] [marijuana] [a controlled substance] [a controlled substance analogue] [a drug] [a substance affecting the central nervous system] [or any combination thereof]* in any form and which deprives one of that clearness of mind and control of oneself which one would otherwise possess. In this situation, it would not be necessary that the person be in such a condition as would make *[him] [her]* guilty of public drunkenness. The law merely requires that the person be under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a controlled substance analogue] [a drug] [a substance affecting the central nervous system] [or any combination thereof]*. The degree of intoxication must

be such that it impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of *[himself]* *[herself]* which *[he]* *[she]* would otherwise possess.⁹

["Proximate result" means a result, which in natural and continuous sequence, is a product of an act occurring or concurring with another, which, had it not happened, the result would not have occurred.]¹⁰

COMMENTS

1. Driving under the influence (first offense) is punishable by a fine of not less than three hundred fifty dollars (\$350) nor more than one thousand five hundred dollars (\$1,500) and confinement in the county jail or workhouse for not less than forty-eight (48) hours nor more than eleven (11) months and twenty-nine (29) days, and the defendant must perform 24 hours of litter pickup. T.C.A. §§ 55-10-402(a)(1)(A) and 55-10-403(a)(1). A defendant whose blood alcohol concentration was twenty-hundredths of one percent (0.20%) shall serve a minimum of seven consecutive days rather than 48 hours. T.C.A. § 55-10-402(a)(1)(B). If the defendant has a prior conviction within the past five (5) years, the court "shall order such person to undergo a drug and alcohol assessment and receive treatment as appropriate." T.C.A. § 55-10-410(a)(4). If the defendant is accompanied by a child, there is a mandatory minimum incarceration of 30 days, and the defendant shall be fined \$1,000 in addition to the fine for the DUI offense. T.C.A. §§ 55-10-402(b)(1) and 55-10-403(a)(5). The incarceration enhancement shall be served in addition to any period of incarceration received for the violation of T.C.A. § 55-10-401. T.C.A. § 55-10-402(b)(1). If the child suffers serious bodily injury as a proximate result, the DUI "shall be punished as provided in § 39-13-106, for vehicular assault." T.C.A. § 55-10-402(b)(2). If the child is killed as a proximate result, the defendant "commits a Class B felony and shall be punished as provided in § 39-13-213(b)(2), for vehicular homicide involving intoxication." T.C.A. § 55-10-402(b)(3). The judge must report any such child endangerment to appropriate authorities for investigation pursuant to T.C.A. § 37-1-403(c)(2).

2. See T.P.I. – Crim. 38.02 (Lawful Use Not a Defense); T.P.I. – Crim. 38.03 (Additional Blood Sample); T.P.I. – Crim. 38.04 (Refusal of Test); T.P.I. – Crim. 38.05 (Blood Alcohol Test); T.P.I. – Crim. 38.06 (Physical Control); T.P.I. – Crim. 38.08 (Supplemental Instruction for Multiple Counts of Prior Convictions); and T.P.I. – Crim. 38.09 (Underage Driving While Impaired).

3. In addition to other punishment, a first offender's driver's license shall be

revoked for 1 year; for a second offense, 2 years; for a third offense, 6 years; for a fourth or subsequent offense, 8 years. T.C.A. § 55-10-404(a)(1).

¹ T.C.A. § 55-10-401 and T.C.A. § 55-10-402(b).

² It is the opinion of the Committee that even though the new DUI statute left out the “or more” language when it was rewritten in 2013, the trial judge, after discussion with the attorneys, may wish to insert that language.

³ It is the opinion of the Committee that even though the new DUI statute left out the “or more” language when it was rewritten in 2013, the trial judge, after discussion with the attorneys, may wish to insert that language.

⁴ As driving under the influence is a Title 55 offense, the definition of “serious bodily injury” contained in T.C.A. § 39-11-106(a)(34) does not strictly apply. T.C.A. § 39-11-106(a) begins with the language “As used in this Title,” and so the definitions contained in that statute only apply to Title 39 offenses. Upon agreement of the parties, it is recommended that a definition of serious bodily injury be included in the written charge. The court may desire to refer to Title 39 for the definition.

⁵ As DUI is a Title 55 offense, the definition of “controlled substance” contained in T.C.A. § 39-17-402(4) does not strictly apply. T.C.A. § 39-17-402 begins with the language “As used in this part and title 53,” and so the definitions contained in that statute only apply to Title 39 and 53 offenses. Upon agreement of the parties, it is recommended that a definition of controlled substance be included in the written charge. The court may desire to refer to Title 39 for the definition.

⁶ As DUI is a Title 55 offense, the definition of “controlled substance analogue” contained in T.C.A. § 39-17-454 does not strictly apply. T.C.A. § 39-17-454 begins with the language “As used in this section,” and so the definition contained in that statute applies only to T.C.A. § 39-17-454. Upon agreement of the parties, the trial judge should include this bracketed language if a controlled substance analogue is alleged in an element and it is one listed in T.C.A. § 39-17-452 as an analogue. If it is not listed, it will be a jury question, and the trial judge should utilize T.P.I. – Crim. 31.20, Controlled substance analogue.

⁷ T.C.A. § 55-50-102(12).

⁸ T.C.A. § 55-50-102(46).

⁹ T.C.A. § 55-10-401(1).

¹⁰ The definition of “proximate result” is based on the definition of “proximate cause,” as set forth in T.P.I. – Crim. 7.05(b), Second degree murder (drugs as proximate cause).

T.P.I. -- CRIM. 38.22

BOATING UNDER THE INFLUENCE

Any person who commits the offense of boating under the influence of *[an intoxicant] [marijuana] [a narcotic drug] [a drug producing stimulating effects on the central nervous system]* is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

- (1) that the defendant was operating a *[vessel subject to registration] [commercial vessel]* on the public waters of Tennessee;

and

- (2)(a) that the defendant was under the influence of *[an intoxicant] [marijuana] [a narcotic drug] [a drug producing stimulating effects on the central nervous system]*;

or

- (b) that the alcohol concentration in the defendant's blood or breath was eight-hundredths of one percent (.08%) or more.

[Evidence that there was, at the time alleged, five-hundredths of one percent (.05%), or less, by weight of alcohol in the blood of the defendant, shall create no inference of intoxication.]²

["Commercial vessel" means any vessel used or whose principal use is to carry passengers for hire for monetary or other consideration or any vessel used or whose principal use is to transport or to assist in the transportation of goods or services.]³

["Drugs producing stimulating effects on the central nervous system" includes the

salts of barbituric acid, also known as malonyl urea, or any compound, derivatives, or mixtures thereof that may be used for producing hypnotic or somnifacient effects, and includes amphetamine, desoxyephedrine or compounds or mixtures thereof, including all derivatives of phenylethylamine or any of the salts thereof, except preparations intended for use in the nose and unfit for internal use.]⁴

["Intoxication" is defined as acting under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a controlled substance analogue] [a drug] [a substance affecting the central nervous system] [or any combination thereof]*.

The expression "under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a controlled substance analogue] [a drug] [a substance affecting the central nervous system] [or any combination thereof]*" covers not only all the well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition which is the result of taking *[an intoxicant] [marijuana] [a controlled substance] [a controlled substance analogue] [a drug] [a substance affecting the central nervous system] [or any combination thereof]* in any form and which deprives one of that clearness of mind and control of oneself which one would otherwise possess. In this situation, it would not be necessary that the person be in such a condition as would make *[him] [her]* guilty of public drunkenness. The law merely requires that the person be under the influence of *[an intoxicant] [marijuana] [a controlled substance] [a controlled substance analogue] [a drug] [a substance affecting the central nervous system] [or any combination thereof]*. The degree of intoxication must be such that it impairs the operator's ability to safely operate a *[vessel subject to registration] [commercial vessel]* by depriving the operator of the clearness of mind and control of

[himself] [herself] which [he] [she] would otherwise possess.^{5]}

[It is not a defense that the defendant, while under the influence of narcotic or barbital drugs, was or had been entitled to use such drugs under the laws of this state.]^{6]}

[It is an exception to this offense that at the time of the alleged intoxication the vessel was moored or anchored.]^{7]}

COMMENTS

1. Boating under the influence is a Class A misdemeanor. A first offense is punishable by a fine of not less than two hundred fifty dollars (\$250) nor more than two thousand five hundred dollars (\$2,500), and confinement for up to eleven (11) months and twenty-nine (29) days. In the discretion of the court, the person's privilege to operate any vessel subject to registration on the public waters of the state shall be suspended for a period not to exceed one (1) year. A second offense carries a fine of not less than five hundred dollars (\$500) nor more than two thousand five hundred dollars (\$2,500), and confinement for a period not to exceed eleven (11) months and twenty-nine (29) days, and the court shall prohibit such convicted person from operating any vessel subject to registration on the public waters of the state for a period of two (2) years. A third or subsequent conviction is punishable by a fine of not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000) and confinement for not less than thirty (30) days nor more than eleven (11) months and twenty-nine (29) days, and the court shall prohibit such person from operating any vessel subject to registration on the public waters of the state for a period of not less than three (3) years nor more than ten (10) years. T.C.A. § 69-9-219(c)(1). In addition, the court, in its discretion, may require any defendant to remove litter from public areas, playgrounds, picnic ramps and areas giving the public access to the public waters of the state or to work in a recycling center or other appropriate location for any prescribed period of time in addition to any of the penalties otherwise provided in this section. T.C.A. § 69-9-219(c)(2).

¹ T.C.A. § 69-9-217(a) and (j)(2).

² T.C.A. § 69-9-217(j)(1).

³ T.C.A. § 69-9-217(b)(1).

⁴ T.C.A. § 69-9-217(b)(2).

⁵ This definition was taken from T.C.A. § 55-10-401(1), the DUI statute.

⁶ T.C.A. § 69-9-217(c).

⁷ T.C.A. § 69-9-217(n).